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Casualties of the War on Crime: Fairness, Reliability and the Credibility of Criminal Justice Systems

STEPHEN B. BRIGHT*

Due process of law has become a casualty of the war on crime. As representatives of both political parties compete to show which is the toughest on crime, the criminal justice systems in the United States have become so result-oriented that little attention is paid to the fairness and reliability of the process which leads to those results. In the quest to obtain more convictions and death sentences, little concern is being shown for the likelihood of error and the need to provide equal justice for persons of color and the poor.

Yet the criminal justice systems are making some of the most important governmental decisions in society—who will lose their liberty and for how long, and who will be put to death. The operation of the criminal justice systems is particularly important to the African-American community. One third of African-American men between the ages of 18 and 30 are under some type of court supervision and by the turn of the century one half of all black men will be in prison or jail, or on probation or parole.1

There is good reason for everyone to be concerned about how well criminal courts are discharging their responsibilities. Supreme Court Justice John Paul Stevens has pointed out that “the recent development of reliable scientific evidentiary methods has made it possible to establish conclusively that a disturbing number of persons who had been sentenced to death were actually innocent.”2 This “most dramatically illustrates” the consequences of failing to provide competent legal counsel to the poor.3 In the 20 years since the Supreme Court upheld the resumption of capital punishment, 59 persons sentenced to death have

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1. See MARC MAUER & TRACY HULING, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER (The Sentencing Project 1995) (providing thorough documentation of the impact that the criminal justice systems are having on young African-Americans and other sources on the subject).


3. Id. at 12.
been freed after establishing their innocence. The Department of Justice has recently published a report on a number of other persons convicted of crimes, but later exonerated by scientific evidence.

Courts make many other important decisions in criminal cases besides guilt or innocence. Courts set bail and determine the lawfulness of law enforcement practices such as searches, seizures and interrogations, all of which have enormous consequences with regard to the type of society we have. A finding of guilt only raises a second question of how that offender is to be punished. Punishments range from community service, to fines, to days in jail, to years in prison, to life imprisonment without the possibility of parole, and to death.

Those decisions are frequently influenced by legally irrelevant considerations such as race, poverty, and politics. Racial disparities are found throughout the criminal justice systems. Virtually every report that has examined the operation of the death penalty has found racial discrimination in its infliction. One of the most recent reports reaching this conclusion was issued in July by the International Commission of Jurists, a highly regarded organization made up of jurists from around the world, after a visit to the United States.

Yet courts tolerate racial discrimination and often refuse even to examine issues of racial prejudice. The Supreme Court allowed Georgia

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to carry out death sentences despite significant racial disparities in the infliction of the death penalty.\footnote{See McCleskey v. Kemp, 481 U.S. 279 (1987) (allowing Georgia to carry out executions even though the death penalty is four times more likely in cases in which the victim was white than in cases involving black victims).} Two African American men sentenced to death by an all-white jury in Utah were executed even though jurors received a note which contained the words "Hang the Nigger's" [sic] and a drawing of a figure hanging on a gallows.\footnote{See Andrews v. Shulsen, 485 U.S. 919, 920-22 (1988) (Marshall, J., dissenting) (opposing the Court's denial of certiorari).} No court, state or federal, even held a hearing on such questions as who wrote the note, what influence it had on the jurors, and how widely it was discussed by the jurors. Similarly, William Henry Hance was executed in Georgia without any court holding a hearing on the use of racial slurs by jurors who decided his fate.\footnote{See Hance v. Zant, 114 S. Ct. 1392, 1392 (1994) (Blackmun, J., dissenting) (opposing the Court's denial of certiorari); Bob Herbert, Mr. Hance's 'Perfect Punishment,' N.Y. TIMES, Mar. 27, 1994, at D17; Bob Herbert, Jury Room Injustice, N.Y. TIMES, Mar. 30, 1994, at A15.} Other courts have refused to look behind gross racial disparities for discrimination.\footnote{See, e.g., Stephens v. State, 456 S.E.2d 560, 561 (Ga. 1995) (holding a \textit{prima facie} case of discrimination was not established even though 98.4 percent of those serving a life sentence for a second drug offense were African American); Jones v. State, 440 S.E.2d 161, 163 (Ga. 1994) (concluding no hearing required with regard to racial discrimination in capital sentencing in one Georgia county); Foster v. State, 614 So. 2d 455, 463 (Fla. 1992), \textit{cert. denied}, 510 U.S. 951 (1993) (concluding no hearing required on racial discrimination in the infliction of the death penalty in Florida); see also Stephen B. Bright, \textit{Discrimination, Death and Denial: The Tolerance of Racial Discrimination in the Infliction of the Death Penalty}, 35 SANTA CLARA L. REV. 433, 467-80 (1995) (describing tolerance of racial discrimination by courts and refusal of courts to hold hearings on issues of racial discrimination).} The tolerance of racial discrimination and the refusal of courts even to examine these issues reveals a lack of commitment to fairness.

This lack of fairness seriously undermines the reliability of the results reached in many cases and the trust which citizens are willing to place in the court system. Unfortunately, many criminal justice systems lack the most basic components of fairness: fair and impartial judges, prosecutors free from political influences, and effective representation for those accused of crimes.

Competition between the political parties to show that they are tough on crime has included efforts to intimidate judges and the removal of state court judges from office by voters after campaigns in which capital punishment was the central issue. When federal Judge Harold Baer suppressed cocaine and heroin seized by New York City police officers,\footnote{See United States v. Bayless, 913 F. Supp. 232, 234, \textit{vacated on rehearing}, 921 F. Supp. 211 (S.D.N.Y. 1996).} Republican presidential candidate Robert Dole called for his
impeachment. Additionally, the Clinton White House suggested it would ask for his resignation if Judge Baer did not reverse his ruling. Judge Baer reversed his ruling.

Since Rose Bird and three of her colleagues were voted off the California Supreme Court in 1986 because of their votes in capital cases, trial and appellate judges in other states have also been removed from the bench for being “soft” on the death penalty. The most recent was Justice Penny White, who was voted off the Tennessee Supreme Court last August in a retention election. In opposing Justice White, the Republican Party mailed a brochure to voters titled, “Just Say NO!” with the slogan, “Vote for Capital Punishment by Voting NO on August 1 for Supreme Court Justice Penny White.” Inside, the brochure described three cases to demonstrate that Justice White “puts the rights of criminals before the rights of victims.” The first case was described as follows: “Richard Odom was convicted of repeatedly raping and stabbing to death a 78-year-old Memphis woman. However, Penny White felt the crime wasn’t heinous enough for the death penalty—so she struck it down.”

The mailing did not disclose that Odom’s case was reversed because all five members of the Tennessee Supreme Court agreed that there had been at least one legal error which required a new sentencing hearing. Nor did it mention that the Tennessee Court of Criminal Appeals also concluded that Odom was entitled to a new sentencing hearing.

15. See Alison Mitchell, Clinton Pressing Judge to Relent, N.Y. TIMES, Mar. 22, 1996, at A1 (“The White House put a Federal judge on public notice today that if he did not reverse a widely criticized decision throwing out drug evidence, the President might ask for his resignation.”). After criticism by bar leaders, the White House backed off from its threat, issuing a statement that “the proper way for the executive branch to contest judicial decisions with which it disagrees is to challenge them in the courts.” Linda Greenhouse, Judges as Political Issues; Clinton Move in New York Case Imperils Judicial Independence, Bar Leaders Say, N.Y. TIMES, Mar. 23, 1996, at A1.
18. See id. at 761-65 (describing removal of judges in Texas and Mississippi in elections after campaigns in which the defeated were attacked for their votes in capital cases).
19. TENNESSEE REPUBLICAN PARTY, JUST SAY NO! BROCHURE (emphasis in original) (on file with author).
20. Id.
21. Id.
22. See State v. Odom, 928 S.W.2d 18 (Tenn. 1996). In an opinion by Justice Birch three members of the Court held that there were three errors requiring reversal. See id. at 32-33. The
The Tennessee Supreme Court affirmed Odom’s conviction and remanded his case for a new sentencing hearing. No member of the Court expressed the view that the crime was not heinous enough to warrant the death penalty. Indeed, the remand for a new sentencing hearing made it quite clear that the Court did not find the death penalty inappropriate for Odom. Justice White did not write the majority opinion, a concurring opinion or a dissenting opinion in the case. Yet Tennessee voters were led to believe that she had personally struck down Odom’s death penalty because she did not think the crime was “heinous enough.”

Justice White’s opponents also blamed her for the fact that Tennessee has not carried out any executions in the last 36 years. But the Odom case was the only capital case that came before the Court during White’s 19 months on the Court. Justice White was opposed by Tennessee’s governor and both its United States Senators, all Republicans.

Immediately after the retention election, the Governor of Tennessee, Don Sundquist, said: “Should a judge look over his shoulder [in making decisions] about whether they’re going to be thrown out of office? I hope so.” This contrasts sharply with a statement made by Supreme Court Justice John Paul Stevens at the American Bar Association meeting in Orlando the same month: “It was never contemplated that the individual who has to protect our individual rights would have

remaining two members of the Court concurred with regard to one error, but dissented with regard to the other two. See id. at 33 (Anderson, C.J., concurring in part and dissenting in part).


24. See State v. Odom, 928 S.W.2d at 18.

25. See Jeff Woods, Sundquist admits early ballot to boot White, NASHVILLE BANNER, July 26, 1996, at B2 (reporting that “White’s foes are casting the election as a referendum on the death penalty”). After the election, Gov. Don Sundquist said White was defeated because voters “believe it’s wrong that we haven’t enforced the death penalty in 36 years, despite the overwhelming need and support for it.” Tom Humphrey, White Ouster Signals New Political Era; Judges May Feel ‘Chilling Effect,’ KNOXVILLE NEWS-SENTINEL, Aug. 4, 1996, at A1. Republican Party chair Jim Burnett said, “The public was fed up. We’ve had a death penalty since 1976 and we haven’t had an execution yet.” John Gibeaut, Taking Aim, ABA JOURNAL, Nov. 1996, at 50, 51. See also Litmus test vs. the law, NASHVILLE TENNESSEAN, Aug. 6, 1996, at 6A (editorial) (“Without a doubt, many of the voters who voted against White were expressing their frustration with the fact that Tennessee has not executed a death row inmate in 36 years.”).

26. See Gibeaut, supra note 25 at 50-51 (describing the defeat of Justice White and challenges to other judges).


to consider what decision would produce the most votes."\textsuperscript{29}

Those like Gov. Sundquist who suggest that removing judges from office for unpopular decisions is nothing more than democracy in action misunderstand the role of courts in our society and the importance of an independent judiciary. As Judge William Cranch wrote, courts have a duty to decide the legal issues before them "undisturbed by the clamor of the multitude."\textsuperscript{30} Often that includes protecting the rights of various minorities—political, racial, and ethnic. Unlike legislatures or executives, courts are not expected to gauge public opinion by resort to focus groups or public opinion polls before making their decisions. Judges are expected to enforce the law, whether it be the First Amendment right of citizens to publish unpopular opinions or the right of a suspected child molester to a fair and impartial trial. As Justice Jackson once said:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.\textsuperscript{31}

The threat that a judge can be removed from office because of an unpopular decision undermines the independence, integrity, and impartiality of the judiciary. The greatest threat to the rule of law comes from those judges who remain on courts but refuse to enforce the law in instances where an unpopular outcome could jeopardize their careers. Once a judge compromises his or her oath by refusing to enforce the law in order to stay in office or advance to a higher court, both the judge and the court are irreparably diminished. When judges must depend upon majority approval, courts are unable to perform one of their most important constitutional roles, described by Justice Black, of serving as "havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are . . . victims of prejudice and public excitement."\textsuperscript{32}

Prosecutors in most states also are elected and their decisions in criminal cases are often not detached professional judgments, but are based upon political considerations. The unlimited discretion that prosecutors are given in directing investigations, in charging, in deciding whether to seek enhanced penalties or death, and in plea bargaining is a


\textsuperscript{30} 1 Charles Warren, \textit{The Supreme Court in United States History} 303 (1926).


\textsuperscript{32} Chambers v. Florida, 309 U.S. 227, 241 (1940).
major cause of the racial disparities throughout the criminal justice systems.

Many states still lack indigent defense systems sufficient to provide representation for poor people accused of crime. Numerous articles and studies make clear the pervasiveness of the problem in all types of criminal cases and the reasons for it: the grossly inadequate funding of indigent defense systems, the lack of public defender programs in many jurisdictions, the lack of independence of defender systems, and the low standard for effective assistance established by the Supreme Court in Strickland v. Washington.33

The lack of commitment to the Sixth Amendment’s promise of a right to counsel is starkly illustrated by the following account of a capital trial in Houston, Texas:

Seated beside his client—a convicted capital murderer—defense attorney John Benn spent much of Thursday afternoon’s trial in apparent deep sleep.

His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.

Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the Nov. 19, 1991, arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan.

When state District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial.

“It’s boring,” the 72-year old longtime Houston lawyer explained.34

This does not offend the Sixth Amendment, the trial judge explained,
because, “[t]he Constitution doesn’t say the lawyer has to be awake.”35 The Texas Court of Criminal Appeals apparently agreed with this analysis. It rejected McFarland’s claim of ineffective assistance of counsel,36 applying the standard set by the United States Supreme Court in Strickland v. Washington.37

George McFarland is not the only person who was condemned to die in Houston, the city responsible for more executions than any other jurisdiction in the country, at a trial in which his defense lawyer slept.38 Calvin Burdine and Carl Johnson both had the misfortune of having attorney Joe Frank Cannon assigned to defend them.39 They are among ten clients of Cannon who have been sentenced to death.40 Cannon has been appointed by judges in Houston to numerous criminal cases in the last 45 years despite his tendency to doze off during trial.41 Carl Johnson was executed on September 19, 1995.42

When one city—the capital of capital punishment—has had three cases involving sleeping lawyers in which the death penalty was imposed and all were upheld by the state’s highest court, it speaks volumes about the lack of commitment to fairness. But equally shocking examples are found throughout the country. A study of homicide cases in Philadelphia, which rivals Houston for its high number of death cases,43 found that the quality of lawyers appointed to capital cases in

35. Id.
38. Since the reinstatement of capital punishment in 1976, more people have been executed from Harris County, which includes Houston, than from any state in the union other than Texas itself. See Barry Sclachter, Texas’ Execution Record Defies Sole Answer, FT. WORTH STAR-TELEGRAM, Feb. 12, 1995, at A10 (“Death sentences from courts in Houston’s county, Harris, alone have accounted for more executions than the second-ranking state, Florida. It now has 114 inmates on death row.”).
39. See Ex parte Burdine, 901 S.W.2d 456, 457 (Tex. Crim. App. 1995) (Maloney, J., dissenting) (describing findings of the trial court and testimony of the clerk of court that defense counsel was sleeping during much of the trial). Neither the Texas Court of Criminal Appeals nor the Fifth Circuit published their opinions upholding the death sentence for Carl Johnson. However, the case, including the sleeping by defense counsel, is described in an article by the lawyer who handled the case during post-conviction proceedings. See David R. Dow, The State, the Death Penalty, and Carl Johnson, 37 B.C. L. REV. 1200 (forscoming) (July 1996) (forthcoming) (stating that “the ineptitude of the lawyer . . . jumps off the printed page” and that later investigation found that the lawyer was sleeping).
40. See Paul M. Barrett, Lawyer’s Fast Work on Death Cases Raises Doubts About System, WALL ST. J., Sept. 7, 1994, at A1 (reporting that Cannon is known for hurrying through capital trials like “greased lightening,” occasionally falls asleep, and has had 10 clients sentenced to death).
41. See id.
42. See NAACP LEGAL DEFENSE & EDUCATIONAL FUND, DEATH ROW U.S.A. 8 (Summer 1996) [hereinafter DEATH ROW U.S.A.].
Philadelphia is so bad that "even officials in charge of the system say they wouldn't want to be represented in Traffic Court by some of the people appointed to defend poor people accused of murder."44 The study found that many of the attorneys were appointed by judges based on political connections, not legal ability. "Philadelphia's poor defendants often find themselves being represented by ward leaders, ward committeemen, failed politicians, the sons of judges and party leaders, and contributors to the judge's election campaigns."45

Other studies have found the same poor quality of representation in capital cases in one state after another. The National Law Journal, after an extensive study of capital cases in the six southern states that account for the vast majority of executions, found that capital trials are "more like a random flip of the coin than a delicate balancing of the scales" because defense lawyers are too often "ill trained, unprepared . . . [and] grossly underpaid."46 The American Bar Association concluded after an exhaustive study that "the inadequacy and inadequate compensation of counsel at trial" was one of the "principal failings of the capital punishment systems in the states today."47

Despite these major deficiencies in the criminal justice systems, Americans are being told that the answer to the crime problem is longer prison terms, harsher conditions of imprisonment, greater use of the death penalty, less due process, and less judicial review. Presently, the United States incarcerates a greater percentage of its population than any country in the world.48 Thirty-eight states provide for the death penalty49 and over 50 federal crimes are punishable by death.50 More people were executed in the United States last year than in any year since

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45. Id.
46. Marcia Coyle et al., Fatal Defense: Trial and Error in the Nation's Death Belt, NAT'L L.J., June 11, 1990, at 30. For twelve articles examining the quality of representation in numerous cases in six states see id. at 30-44.
48. See 1,725 New Prisons Beds a Week: Biggest 1-Year Spurt in Inmate Population, ATLANTA CONST., Dec. 4, 1995, at 1A (reporting a Department of Justice announcement that there are 1.1 million inmates in prison and another 484,000 in jails, giving the United States an incarceration rate of 565 per 100,000, higher than even Russia, which had been the world leader).
49. See DEATH ROW U.S.A., supra note 42, at 1.
the reinstatement of capital punishment in 1976. The United States is one of only five countries in the world that has executed children in the last six years. The others are Iran, Pakistan, Saudi Arabia and Yemen.

People are being imprisoned for longer periods of time in harsher conditions. Politicians have eliminated educational and vocational programs for prisoners, removed exercise equipment from prisons, and resorted to various types of primitive measures of punishment—such as the chain gang, breaking rocks with sledge hammers and digging ditches—to show how tough they can be.

There has been virtually no debate among politicians about the wisdom of these measures—whether they constitute an effective crime control policy, whether they will actually make Americans safer in their homes and on the streets. Nor has there been any discussion of the importance of the fairness and the integrity of the system, the importance of the Bill of Rights, and the question of what kind of society we want to have and how the least among us are to be treated.

Although long prison terms and death sentences may be the results the public wants, ultimately citizens will have little respect for courts that bend with the political winds. And no one can be expected to trust or respect judgments obtained at trials where the accused was not adequately represented.

A fair process is essential to ensure that decisions made in the criminal justice system are as well informed and as reliable as humanly possible. Before the execution of Horace Dunkins by Alabama in 1989, when newspapers reported that Dunkins was mentally retarded, at least

53. See id.
55. Although politicians in both major parties have been unwilling to question these policies for fear of appearing "soft on crime," they have been questioned by academics and other commentators. See, e.g., Campaign for Effective Crime Policy, The Impact of "Three Strikes and You're Out" Laws: What Have We Learned? (1996) (analyzing effect and impact of "three strikes" laws); David J. Rothman, The Crime of Punishment, The N.Y. Rev. Books, Feb. 17, 1994, at 34 (reviewing several books and studies of crime and corrections policies).
one citizen who sat on Dunkins’ case as a juror came forward and said she would not have voted for the death sentence if she had known of his mental limitations.\(^{56}\) Because of the poor legal representation that Dunkins had received from his court-appointed lawyer, evidence of his mental retardation was not presented to the jury. The jury was unable to perform its constitutional obligation to impose a sentence based on “a reasoned moral response to the defendant’s background, character and crime,”\(^{57}\) because it was not informed by defense counsel of his disability. Nevertheless, Dunkins was executed. Fairness also matters because of the importance of keeping improper influences, such as racial prejudice, from influencing the outcome of cases.

Nevertheless, Congress drastically limited one of the most fundamental safeguards which protect individuals from unlawful imprisonment or execution, habeas corpus review. Habeas corpus is the mechanism by which a person convicted in a state or federal court may petition the federal courts for review of a conviction or sentence on the grounds that it was obtained in violation of the Constitution.\(^ {58}\) In an effort to increase the number and speed of executions, Congress eliminated funding for the death penalty resource centers, which had provided lawyers to the condemned in habeas corpus proceedings,\(^ {59}\) and passed the Antiterrorism and Effective Death Penalty Act of 1996,\(^ {60}\) which places new, unprecedented restrictions on habeas corpus review.

For the first time in the nation’s history, Congress has imposed a statute of limitations on petitions for habeas corpus relief.\(^ {61}\) The Act also prohibits federal courts from granting habeas corpus relief unless the decision of the state court “involved an unreasonable application of clearly established Federal law,”\(^ {62}\) severely limits when a federal court may conduct an evidentiary hearing,\(^ {63}\) and prohibits second or “successive” petitions for habeas corpus relief except in very narrow

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62. Section 104(3)(1) (codified at 28 U.S.C. § 2254(d)(1)).

63. See section 104(4) (codified at 28 U.S.C. § 2254(3)(2)).
The provisions of the Antiterrorism and Effective Death Penalty Act represent a decision that results are more important than process, that finality is more important than fairness, that it is more important to get on with executions than determining whether convictions and sentences were fairly and reliably obtained. Such a system produces politically desirable results—convictions and death sentences—but it does not produce justice. The criminal courts of the United States are courts of vengeance, but they are not courts of justice.

To change this, judges must be selected on merit and insulated from political pressures, public defender programs must be established and adequately funded to provide competent legal assistance to poor people accused of crimes, and all parts of the community must be involved in the process. Such changes will begin to come about only when there is a realization that demagoguery on the issue of crime does not make citizens safer, that the Bill of Rights is not a collection of technicalities, and that everyone has an interest in the fairness and integrity of the courts.

In Robert Bolt’s play, *A Man for All Seasons*, a young man argues that laws that are inconvenient or unpopular should not be followed; indeed, he would “cut down every law in England [to pursue the Devil].” Thomas More responds: “[a]nd when the last law was down, and the Devil turned round on you—where would you hide . . . all the laws being flat? This country’s planted thick with laws . . . [do you] really think you could stand upright in the winds that would blow then?”

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64. See sections 105, 106 (codified at 28 U.S.C. §§ 2255, 2244(b)) (limiting any successive habeas corpus petition to constitutional violations which resulted in the conviction of an innocent person or involved a new rule of law that applies retroactively to cases on collateral review).
66. Id.